

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-07/09-417
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 Appeal of)

The petitioner appeals the decisions by the Department for Children and Families (DCF) substantiating a report that she abused or neglected her teenage son and refusing to expunge that report from its child abuse registry. The Department has moved for summary judgment based on the findings and order by the Family Court in a CHINS proceeding regarding the incident in question. The issue is whether the findings of the Family Court are binding on the Board as a matter of collateral estoppel.

On June 18, 2003, the Department received a report that the petitioner had physically assaulted her then-fifteen-year-old son during an altercation in the family home. The incident, as reported by the petitioner's son to the Department and the police, included allegations that the petitioner slapped her son, wrestled him to the floor, and held him down by placing her knee on his neck, causing him to

choke and vomit. Later that night the police took the boy to the emergency room, where it was observed that he had bruises on his arms and abdomen and that both his thumbs had been sprained. At all times, the petitioner has maintained that her actions were the minimum necessary to restrain her son and to protect herself during the physical altercation that he had initiated.

A CHINS proceeding based on the incident was initiated on June 19, 2003. As a result, the boy was placed in temporary foster care under DCF custody. A contested "merits" hearing was held on November 24, 2003. On December 4, 2003 the Family Court made oral findings and issued a written order that the boy was a "child in need of supervision" pursuant to 33 V.S.A. § 5102, and that he remain in DCF custody pending a "disposition" hearing. In an Order of Disposition dated January 8, 2004 the Family Court transferred legal and custody and guardianship of the boy to DCF. Since that time the petitioner has had little contact with her son, who is now an adult.

At some unspecified time following the incident the Department substantiated the report as "physical abuse" and placed the petitioner's name in its child abuse registry. Sometime in spring 2009 the petitioner filed a request for

expungement. In a review decision dated June 30, 2009 the Department denied this request. The Board received the petitioner's appeal of this decision on July 31, 2009.

Monthly telephone status conferences were held by the hearing officer in the matter from September 2009 through January 2010. The petitioner participated in these conferences with lay advocates. It became clear at the outset that the petitioner primarily wished to appeal the Department's underlying substantiation of the incident. Continuances were requested and granted in order to provide the petitioner with copies of the Department's records and to allow the Department to locate and contact the potential witnesses it might need at a hearing. In February 2010 the petitioner's attorney entered his appearance in the matter. Following some negotiation, the Department agreed to review the underlying bases of its substantiation.

At telephone status conferences held on April 12 and May 17, 2010 the parties reported that they were still trying to arrive at an agreement regarding which issues the petitioner would pursue on appeal. At a telephone status conference on June 7, 2010 the parties agreed that the hearing officer would issue a preliminary ruling regarding the oral findings of the Family Court in the 2003 CHINS hearing. Following a

memorandum to the parties from the hearing officer dated June 24, 2010, and a telephone status conference held on July 6, 2010, the parties agreed that the hearing officer would proceed with a recommendation on the issue of collateral estoppel based on the record of the Family Court's oral findings in the CHINS matter dated December 4, 2003.

In the record of the CHINS hearing held on December 4, 2003 the Family Court made oral findings that although the petitioner did not "intend" to cause "injury" to her son, and had not necessarily "abused" him as that term is defined in 33 V.S.A. § 5102(3)(A), she had used "overly extreme and unnecessary" force against her son (including "punching" him and causing him to "choke" and "vomit") that met the definition of CHINS under 33 V.S.A. § 5102(3)(B).

33 V.S.A. § 5102 includes the following provisions:

(3) "Child in need of care or supervision (CHINS)" means a child who:

(A) has been abandoned or abused by the child's parent.
. . .

(B) is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being. . .

Abuse and neglect are specifically defined in the DCF "Child Welfare Services" statutes, in pertinent part, as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . . .

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment

. . . .

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

33 V.S.A. § 4912

For purposes of its Motion for Summary Judgment the Department admits that the Family Court did not specifically find that there had been "abuse" under Part (A) of § 5102(3), *supra*. However, the Department maintains that, at a minimum, the findings and legal conclusions made by the Vermont Family Court clearly fall within of the definition of "risk of harm" under § 4912(4).

The Board need not reach the issue of whether the findings of the Family Court are sufficient to conclude that there was "physical injury" to the child under § 4912(3)(A), *supra*. The Family Court clearly stated that it would not find "abuse" as the basis for its CHINS ruling because it equated abuse under *that statute* with proof of physical

injury, which it deemed to be more than "bruises". However, "risk of harm", as that term is used in the child welfare statutes, can stem from either "abuse" or "neglect" as set forth in § 4912(2). Regardless of the Family Court's legal analysis of the CHINS statute, it must be concluded that its findings that the petitioner used "extreme and unnecessary" force sufficient to determine that the child was "without proper parental care . . . necessary for his well-being" is dispositive of any question in this matter whether the petitioner placed her son at "risk of harm" as defined in § 4912(4), *supra*. The Board has observed that absent a finding of incapacity on the part of a parent or caregiver (which the petitioner here has never alleged) it would be perverse to conclude that the legislature could have intended a statutory scenario in which a parent could lose custody of her child (in this case permanently) under CHINS for some act or omission less culpable than "risk of harm" as defined and contemplated by §§ 4912(2) & (4). (See Fair Hearing No. H-07/08-305.)

Moreover, the Board has repeatedly and consistently adopted the doctrine of collateral estoppel in prior proceedings of this nature and has relied on the test established in Trepanier v. Getting Organized, Inc. 155 Vt.

259 (1990), to determine whether it is precluded by the findings in a Family Court proceeding from making its own findings in the context of a "substantiation hearing". The criteria set forth by that Court are as follows:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as the one raised in the later action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the action is fair.

Id at 265.

In this matter, there is no question that the petitioner was a party in the earlier Family Court proceedings (1, *supra*), and that the factual issues in that case were the same as presented here (3). It is clear that the petitioner had a full and fair opportunity to litigate the issues in Family Court (4), and, as discussed above, it must be concluded that the "issue" (i.e., whether sufficient facts were found that constitute the petitioner having placed her child at risk of harm) was clearly and sufficiently resolved by the Family Court in its findings and conclusions in that matter (2). In light of the above, it must also be concluded

that applying preclusion is "fair" to the petitioner.

(Indeed, not applying preclusion would arguably be *unfair* to the Department if it were required to relitigate the exact same issues seven years later.)

In light of the above, summary judgment is clearly appropriate, but only insofar as it relates to the facts and issues that were ruled upon by the Family Court, i.e., "risk of harm".¹ It is not clear at this time whether the petitioner would wish to pursue, and whether the Department would agree to reconsider, her request for expungement in light of this decision. See 33 V.S.A. § 4916c(a). The matter should be remanded to the Department for any further consideration of this issue.²

ORDER

The Department's request for summary judgment in its favor on the issue of substantiation is granted. The matter

¹ In terms of substantiation, the Department has indicated that it will not press for a separate ruling, or take any further action on the issue of "physical injury".

² The petitioner is free to appeal any adverse decision by the Department in this regard.

is remanded to the Department to consider any further request for expungement by the petitioner in light of this decision.

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